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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

TEXAS EXTRUSION CORPORATION, PICKENS INDUSTRIES, INC., RICHARD W. PICKENS and LOUISE R. PICKENS,
Petitioners,

v.

LOCKHEED CORPORATION,
Respondent.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

EMIL LIPPE, JR. P.C.
1999 Bryan Street
Suite 2727
Dallas, Texas 75201-3124
(214) 720-6076
Counsel of Record

Of Counsel:

LIPPE & ASSOCIATES
1999 Bryan Street
Suite 2727
Dallas, Texas 75201-3124
(214) 720-6076

MILTON G. HAMMOND
1999 Bryan Street
Suite 2727
Dallas, Texas 75201-3124
(214) 720-6076

Counsel for Petitioners

October 26, 1988

Alpha Law Brief Co., Inc. — 8748 Westpark—Houston, Texas 77063 — 789-2000

QUESTIONS PRESENTED

1. Does a disclosure statement which fails to provide a complete and accurate description and evaluation of lawsuits which are the debtors' largest assets and defenses to the debtors' largest claims, and fails to state directly the primary choice presented to the creditors, satisfy the "adequate information" standard of 11 U.S.C. § 1125?

2. Does a bankruptcy court have the statutory and constitutional power to enter a final, dispositive order of dismissal, and make fact findings, concerning lawsuits involving breach of contract and fraud claims, as part of "proceedings in respect of confirmation of plans"?

3. Do Bankruptcy Rule 9003, DR 7-110(B) of the Code of Professional Responsibility, and Canon 3A(4) of the Code of Judicial Conduct, prohibit repeated and extended ex parte discussions between the bankruptcy judge and counsel for the winning party in a contested matter, where counsel and the judge prepare and discuss four amended versions of written findings of fact and conclusions of law?

LIST OF PARTIES

The parties to the proceedings below were:

Petitioners

Texas Extrusion Corporation

Pickens Industries, Inc. (holder of 100% of stock of Texas Extrusion Corporation)

Richard W. Pickens and Louise R. Pickens, husband and wife (owners of 80% of stock of Pickens Industries, Inc.)

Affiliates

Texas B&P Machine Co., Inc.

Texas Extrusion Presses, Inc.

Respondent

Lockheed Corporation

Affiliate

Lockheed Finance Corp.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	I
LIST OF PARTIES	II
TABLE OF CONTENTS	III
TABLE OF AUTHORITIES	III
I. There Is A Conflict Among The Circuit Courts Regarding The Proper Interpretation Of 28 U.S.C. § 157.	1
CONCLUSION	3

TABLE OF AUTHORITIES

CASES

	Page
In Re Arnold Print Works, Inc., 815 F.2d 165 (1st Cir. 1987)	2
In Re Castlerock Properties, 781 F.2d 159 (9th Cir. 1986)	1, 2, 3
Northern Pipeline Construction Co. v. Marathon Pipeline Co., 458 U.S. 50 (1982)	3

UNITED STATES STATUTES

28 U.S.C. § 157	1, 2, 3
28 U.S.C. § 157(b)(2)(A)	2
28 U.S.C. § 157(b)(2)(O)	2

The petitioners, Texas Extrusion Corporation, Pickens Industries, Inc., Richard W. Pickens and Louise R. Pickens, hereby file this supplemental brief in support of their petition for certiorari and respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled proceeding on May 12, 1988.

I.

There Is A Conflict Among The Circuit Courts Regarding The Proper Interpretation Of 28 U.S.C. § 157.

In the petition for certiorari, petitioners have explained the two methods of construction being utilized by the lower courts in interpreting 28 U.S.C. § 157, which is the successor statute to the "Emergency Rule".[1] One case following the restrictive analysis which was not cited in footnote 8 of the petition for certiorari is *In Re Castlerock Properties*, 781 F.2d 159 (9th Cir. 1986). In the *Castlerock* case, the court stated:

> . . . we are persuaded that a court should avoid characterizing a proceeding as "core" if to do so would raise constitutional problems. *See Mohawk*, 46 B.R. at 466; *Moric Electric*, 47 B.R. at 237-38. The apparent broad reading that can be given to § 157(b)(2) should be tempered by the *Marathon* decision. *American Energy*, 50 B.R. at 178.

781 F.2d at 162.

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1. *See* petition for a writ of certiorari, pages 17-21, and footnotes 7 and 8.

The *Castlerock* court holds specifically that state law contract claims not specifically falling within a category of core proceedings enumerated in the statute are non-core proceedings, even if they arguably fit within the literal wording of the two catch-all provisions contained in 28 U.S.C. § 157(b)(2)(A) and (O). 781 F.2d at 162. This holding is in direct conflict with the holding in *In Re Arnold Print Works, Inc.*, 815 F.2d 165 (1st Cir. 1987), which is cited in the petition for writ of certiorari,[2] and with the Fifth Circuit decision in this case. *See* App. at 47a. Specifically, the court in *Arnold* held that a claim by a debtor-in-possession to collect a post-petition debt is a core proceeding because it falls within the literal wording of 28 U.S.C. § 157(b)(2)(A), "matters concerning the administration of the estate." 815 F.2d at 168. The court in *Castlerock* specifically rejected this reading of § 157(b)(2)(A), stating that

> State law contract claims that do not specifically fall within the categories of core proceedings enumerated in 28 U.S.C. § 157(b)(2)(B-N) are related proceedings under § 157(c) even if they arguably fit within the literal wording of the two catch-all provisions, § 157(b)(2)(A)(O). To hold otherwise would allow the bankruptcy court to enter final judgments that this court has held unconstitutional.

781 F.2d at 162.

Hence, the two conflicting views of 28 U.S.C. § 157 (*i.e.*, whether to construe the statute broadly to include all types of proceedings coming within the literal meaning of the statute, or more narrowly, using the analysis

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2. *See* petition for writ of certiorari, page 18, footnote 7.

in *Marathon* as a guideline) actually constitute a direct conflict among the circuits. The Fifth Circuit decision in this case has incorrectly joined the First Circuit, and a number of lower courts, in reading the jurisdictional statute broadly, in conflict with this Court's decision in *Marathon*, and the Ninth Circuit's decision in *Castlerock*. This conflict illustrates the confusion and difference of opinion among federal courts generally in interpreting this statute and the resulting need for guidance from this Court.

CONCLUSION

For the reasons stated above, in the petition for writ of certiorari, and in the reply brief in support of petition for certiorari, the petition for certiorari should be granted. Upon final consideration, the written findings of fact should be stricken, and the order of the Bankruptcy Court either reversed, with the matter remanded to the Bankruptcy Court for further action, or, in the alternative, remanded to the District Court for a de novo determination of the facts consistent with 28 U.S.C. § 157, and this Court's ruling in *Marathon*, and petitioners should be awarded their costs and general relief.

Respectfully submitted,

EMIL LIPPE, JR. P.C.
1999 Bryan Street
Suite 2727
Dallas, Texas 75201-3124
(214) 720-6076
Counsel of Record

MILTON G. HAMMOND
1999 Bryan Street
Suite 2727
Dallas, Texas 75201-3124
(214) 720-6076

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